

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONALD D. BOWER)
Claimant)
VS.)
AMARR GARAGE DOORS)
Respondent) Docket No. **1,024,862**
AND)
TRAVELERS INDEMNITY CO.)
Insurance Carrier)

RONALD D. BOWER)
Claimant)
VS.) Docket No. **1,031,956**
CONAGRA FOODS)
Self-Insured Respondent)

ORDER

Respondent, Amarr Garage Doors, and its insurance carrier, Travelers Indemnity Co. requested review of the June 15, 2009, Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on October 6, 2009.

APPEARANCES

Jan L. Fisher of Topeka, Kansas, appeared for the claimant. Ronald A. Prichard of Overland Park, Kansas, appeared for Amarr Garage Doors (Amarr) and Travelers Indemnity Co. Matthew J. Stretz of Kansas City, Missouri, appeared for the self-insured ConAgra Foods (ConAgra).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board, the parties stipulated that any work disability should be based upon a 100 percent wage loss and a 34 percent task loss, or 67 percent.

ISSUES

Claimant filed claims for injuries suffered as a result of an accident on September 9, 2004, while working for Amarr (Docket No. 1,024,862) and an accident on January 18, 2006, while working for ConAgra (Docket No. 1,031,956). The ALJ consolidated the two claims for litigation and award.

In the June 15, 2009 Award, the ALJ found claimant had a 41 percent wage loss and a 34 percent task loss for a 37.5 percent work disability. Moreover, the ALJ found that the January 2006 accident that claimant suffered at ConAgra was the natural and probable consequence of the injuries he sustained from the September 2004 accident at Amarr. Consequently, the ALJ assessed liability for both accidents against Amarr.

Amarr and Travelers contend that if claimant sustained any permanent injury from his September 2004 accident then he should receive permanent disability benefits for a scheduled injury to the right knee only. They also argue that claimant would not have injured his low back, right hip, and right knee on January 18, 2006, but for being on a ladder; consequently, claimant's injuries were caused by falling from the ladder and ConAgra should be held responsible for that accident.

On the other hand, ConAgra contends the evidence is overwhelming that claimant's January 2006 accident at ConAgra was the natural and probable consequence of his preexisting knee condition and, therefore, that accident should not be ConAgra's responsibility. In short, ConAgra argues the Award should be affirmed.

Claimant asserts his injuries are the result of the September 2004 accident at Amarr and that any increased impairment from the ConAgra accident was the natural and probable result of the injuries sustained at Amarr. Claimant requests a work disability under K.S.A. 44-510e and that it be assessed against Amarr.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board makes the following findings and conclusions:

After leaving the Navy in 1993, claimant worked for Essex Wire in Topeka, Kansas, as an industrial electrician until the company closed in 1999. During those six years, claimant experienced only minor problems with his right knee, which had been surgically repaired in 1983 while in the Navy. The Board also notes that in 1988 claimant injured his back in a hazing incident and subsequently developed occasional low back pain.

After leaving Essex Wire claimant commenced working for respondent Amarr as a maintenance technician. That position required claimant to maintain the company's machinery, equipment and facilities. His duties required heavy pulling and lifting, carrying tools, and crawling on his knees. But despite the physical nature of the job, claimant worked without experiencing problems with his right knee and low back. In April 2003, claimant became a supervisor. His work became less physical, but on occasion he still had to perform the more physical duties while filling in for technicians.

On September 9, 2004, claimant was injured at work when he stepped into a hole while inspecting a window. He described the accident as follows:

I went up to the window, found that it was just some caulking had come out and pushed that in and fixed it. And it was on a slope. The ground was sloped up to the building and there was a small ground cover of some sort of an evergreen right around the building. As I turned -- turned around I stepped my right foot into a hole that was approximately 12 inches deep and 18 inches in diameter that was underneath this ground covering where you could not see it. And my leg buckled and twisted underneath me.¹

Claimant notified his supervisor and was ultimately sent for medical treatment with Dr. Sergeant at Lawrence Occupational Health. The doctor prescribed some anti-inflammatory medication and eventually referred him for an MRI. After the MRI, claimant was referred to Dr. Daniel Stechschulte, an orthopedic specialist, in Overland Park, Kansas. When claimant requested additional medication, Amarr contacted Travelers, who denied the request. Claimant was advised to seek medical treatment from the Veteran's Administration (VA), and he complied.

Claimant's right knee, right hip and low back symptoms continued throughout his employment with Amarr, which the company severed on June 17, 2005.

Approximately eight weeks later, claimant found another job with ConAgra in Junction City, Kansas. He was hired as a programmable logic controller, which claimant indicated was essentially an industrial electrician. Claimant initially trained the mechanics in electrical troubleshooting and repair and also trained the maintenance staff. But in late October 2005 claimant's job was changed to that of an electrician, which was more physically demanding.

On January 18, 2006, after a physically demanding day, claimant fell when his right knee gave way while descending a ladder. He described the accident as follows:

¹ Bower Depo. (Mar. 16, 2007) at 25-26.

Everything was done. I just hadn't finished the final putting the conduit covers on. And I climbed up a ladder to do the very last one and in the switch gear room and as I was coming down that ladder, all of a sudden when I stepped down on my right leg it was just - - it was not even there.²

Claimant did not miss any work due to the January 2006 accident. But he did receive conservative medical treatment from an occupational clinic in Manhattan, Kansas. When released from that medical treatment, claimant felt that his right knee, hip, and low back were for the most part back to their baseline following the September 2004 accident at Amarr.

Following his medical release from the January 2006 injury, claimant returned to the VA for treatment of his right knee, right hip, and low back. The VA treatment continued until a June 2007 preliminary hearing, when the ALJ authorized Dr. Danny M. Gurba, a board certified orthopedic surgeon, to examine claimant. Dr. Gurba recommended a right knee replacement, which the doctor performed in August 2007.

A brief mention of claimant's employment history is appropriate here. In March 2006 claimant terminated his employment at ConAgra, partly because of the drive to work in Junction City from his Topeka home and partly because the job was physically demanding. Claimant quickly obtained other employment with Innovia Films in Tecumseh, Kansas, where he worked as a control technician for seven months.

Claimant then obtained a less physically demanding job as a maintenance supervisor at Reser's Fine Foods (Reser's) in Topeka, Kansas, where he was employed at the time of the June 2007 preliminary hearing. Unfortunately, Reser's terminated claimant when he was delayed in returning to work due to a pulmonary embolism that he developed following the right knee surgery. At the time of the November 2008 regular hearing, claimant was attending school under a veteran's disability program and looking for work.

Four doctors provided their opinions of claimant's functional impairment as measured by the Fourth Edition of the *AMA Guides*³. Dr. Gurba, who specializes in hip and knee joint replacement, treated claimant from August 2007 through February 2008 and rated the impairment in claimant's right lower extremity at 37 percent, or 15 percent to the

² *Ibid.* at 48-49.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

whole person.⁴ The doctor was never asked and never addressed the cause of claimant's knee problems. Likewise, the doctor did not delve into whether claimant had aggravated or injured his hip or low back. Dr. Gurba, however, acknowledged the physical therapist had written him, and noted on several occasions, that claimant was experiencing right hip and low back pain.

The next doctor, Dr. P. Brent Koprivica, who is board certified in emergency medicine and also certified as an independent medical examiner, examined claimant in June 2008 at the request of claimant's attorney. The doctor believed claimant's right knee had an anterior cruciate ligament deficient and end-state tri-compartmental arthritis that was causing an abnormal gait and ongoing pain before the September 9, 2004 accident. Accordingly, Dr. Koprivica concluded claimant had a 25 percent impairment to his right lower extremity before the September 2004 accident and a 50 percent impairment afterwards. (A 25 percent impairment to the lower extremity converts to a 10 percent whole person impairment.)

Dr. Koprivica also concluded claimant injured his low back in both the September 2004 and January 2006 accidents and that each accident caused a five percent whole person impairment.⁵ Using the *AMA Guides Combined Values Chart* and excluding the preexisting functional impairment to claimant's right knee, the doctor rated claimant as having a 15 percent whole person impairment for the injuries claimant sustained to his right knee and low back in both the September 2004 and January 2006 accidents.

Dr. Koprivica did not believe claimant had a preexisting impairment due to his low back because claimant's symptoms before September 2004 were intermittent. The doctor, however, did acknowledge that one could argue the preexisting impairment for claimant's low back was 5 percent in which event the doctor would find to be in addition to the 10 percent that the doctor assigned.⁶

Moreover, Dr. Koprivica indicated that claimant's September 2004 accident aggravated the degenerative disease in his knee and, in fact, accelerated the rate of degeneration claimant was experiencing in that joint. The doctor testified, in part:

Q. We talked about the fact that he had some degenerative things going on in his knee. Does trauma such as the stepping in the hole and the pop that he felt change the rate of acceleration of that degeneration?

⁴ Gurba Depo. at 15.

⁵ Koprivica Depo. at 29.

⁶ *Ibid.* at 30.

A. It can. The way that you judge that is based on what happens clinically. It's not 100 percent of the time that that happens. But in this case where you have an individual who is functioning, if you assume the history is accurate, that's his level of function prior to stepping in the hole. The fact is that whenever you have an episode like this where you have an unusual stress placed on the knee and following which you have complaints of severe pain, can't walk normal, and then ultimately you do the surgery, that requires it. It's clear there has been structural aggravation to the cartilage surface. And that accelerates the underlying further degeneration of what remaining cartilage there is.

Q. Is that your opinion in regards to specifically Mr. Bower?

A. Yes. I'm relying on the truthfulness of the information he's providing, but it was supported by the records I reviewed as well.⁷

Furthermore, Dr. Koprivica opined that claimant's January 2006 accident, which was caused when claimant's right knee gave way, was a natural and probable result of the September 2004 accident and resulting injury at Amarr.

Dr. Chris D. Fevurly, who is board certified in internal medicine, preventative medicine, and independent medical examinations, examined claimant in early November 2008 at the request of ConAgra's attorney. Dr. Fevurly opined that claimant's January 2006 accident was the result of the preexisting condition in his right knee and that the accident only temporarily exacerbated his hip and low back symptoms. The doctor testified, in part:

Q. (Mr. Stretz) Where do you fall in terms of establishing whether or not there was a subsequent injury that occurred at ConAgra? Do you believe that that's an injury that occurred because of an accident that was caused by working at ConAgra, or do you believe that the accident to the buckling that occurred for Mr. Bower at ConAgra was a result primarily of preexisting conditions?

A. (Dr. Fevurly) Well, I think that the mechanism of the injury was the result of a preexisting condition. I mean, it's pretty clear that his right knee was unstable and that's what caused his fall. I don't think there was any change in appearance or pathology from the fall. I don't think there was any so-called acceleration in the pathology that already preexisted the fall of January 18th, 2006.

Q. And what about his back and his hip? Did those -- what happened with those?

⁷ Koprivica Depo. at 15-16.

A. Well, I think he had a temporary acute exacerbation of those conditions, but he returned to baseline within about three weeks.⁸

According to Dr. Fevurly, there is no evidence that claimant sustained any functional impairment due to the January 2006 accident at ConAgra or that claimant had any greater work restrictions or limitations after he recovered from that accident.⁹

Dr. Fevurly neither provided an opinion regarding claimant's overall functional impairment nor addressed whether claimant sustained any functional impairment as a result of the September 2004 accident. Likewise, the doctor did not provide an opinion regarding the extent of claimant's impairment, if any, before claimant's September 2004 accident.

The fourth doctor, Dr. Peter Bieri evaluated claimant at the ALJ's request. Dr. Bieri did not testify but his January 13, 2009 report is part of the record. That medical report notes that claimant has a 50 percent impairment in his right extremity, which equates to a 20 percent whole person impairment. In addition, the doctor believes 60 percent of that impairment existed before claimant's September 2004 accident at Amarr, which caused the remaining 40 percent. Needless to say, the doctor concluded the January 2006 accident at ConAgra did not contribute to claimant's lower extremity impairment.

Dr. Bieri found the apportionment of claimant's low back impairment to be less clear. Nonetheless, the doctor concluded claimant had a 10 percent whole person impairment due to his low back injury. In addition, he concluded claimant had a 6 percent whole person impairment due to his low back before the September 2004 accident and an additional 2 percent due to both the September 2004 and January 2006 accidents. Dr. Bieri wrote in part:

The situation regarding the lumbar spine region is less clear. . . . With reference to page 102 [of the *AMA Guides*], the claimant falls in DRE Lumbo-sacral III, qualifying for ten percent (10%) whole person impairment.

Six percent (6%) whole person impairment is awarded for pre-existing disease, and two percent (2%) whole person impairment is awarded for residuals experienced as the result of the injury of September 9, 2004 and the injury of January 18, 2006.

The combined whole person impairment attributable to injury on or about September 9, 2004 would be ten percent (10%).

⁸ Fevurly Depo. at 12-13.

⁹ *Ibid.* at 13-14.

The combined whole person impairment of injury reported on or about January 18, 2006 would be two percent (2%).

The combined total whole person impairment of both injuries would be twelve percent (12%).

While the claimant has subjective complaints involving the right hip, he fails to meet the criteria for additional permanent impairment attributable to either injury.¹⁰

The ALJ averaged Dr. Bieri's 12 percent whole person functional impairment rating with Dr. Koprivica's 15 percent whole person functional impairment rating and found that claimant had sustained a 13.5 percent whole person impairment due to his September 2004 and January 2006 injuries. The Board affirms that finding.

Injured workers are entitled to receive compensation for later injuries that naturally occur or arise from out of an earlier compensable work-related injury.

In workers compensation litigation, when there is uncontroverted expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury.¹¹

The secondary injury rule allows a claimant to receive compensation for all of the natural consequences arising out of an injury, including any new and distinct injuries that are the direct and natural result of the primary injury. 208 Kan. at 643.¹²

The question of whether an injury results from a new and separate accident depends on the facts in each case. When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury. See *Frazier*, 268 Kan. At 355; *Makalous v. Kansas State Highway Commission*, 222 Kan. 477, 480-81, 486, 565 P.2d 254 (1977) (internal hemorrhage in claimant's coronary artery resulting from being hit with a post during extremely cold weather caused claimant to have a heart attack 3 months later); *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977) (torn cartilage in claimant's knee from 1973 injury caused the knee to lock in 1975, requiring surgery); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 201, 547 P.2d 751 (1976)

¹⁰ Dr. Bieri's IME report dated January 13, 2009.

¹¹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 3, 154 P.3d 494 (2007).

¹² *Casco* at 515.

(injury to claimant's knee caused change in posture and gait which resulted in a disability in claimant's back); *Reese v. Gas Engineering & Construction Co.*, 219 Kan. 536, 540-41, 548 P.2d 746 (1976) (injury to claimant's leg caused compensable disability in claimant's back and other leg); *Bergmann v. North Central Foundry, Inc.*, 215 Kan. 685, 686-87, 689, 527 P.2d 1044 (1974) (severe crush injury to claimant's foot caused disability in claimant's back); *Jackson*, 208 Kan. at 643; *Logsdon v. Boeing Co.*, 35 Kan.App.2d 79, 128 P.3d 430 (2006) (injury to claimant's shoulder in 1993 caused it to dislocate when he slipped and fell in 2004); *Woodward v. Beech Aircraft Corp.*, 24 Kan.App.2d 510, 512-13, 949 P.2d 1149 (1997) (twisting injury to claimant's left knee caused overuse of right knee and aggravated a preexisting condition, causing disability in claimant's right knee); *Wall v. Gage Bowl, Inc.*, No. 89,350, unpublished Court of Appeals opinion filed April 18, 2003 (injury to claimant's left elbow caused overuse injury to right arm). . . . ¹³

The Board concludes claimant's January 2006 accident was the direct consequence of the September 2004 accident and resulting injury. The evidence is overwhelming that claimant's right knee gave way on January 18, 2006, at ConAgra when claimant was descending the ladder. Consequently, Amarr is responsible for the workers compensation benefits claimant is entitled to receive from both accidents.

The Board affirms the ALJ's finding that claimant's January 2006 accident did not cause claimant either permanent injury or a permanent functional impairment. Claimant, however, did incur medical expense that should likewise be Amarr's responsibility.

Because claimant's back injury is not compensated under the schedule in K.S.A. 44-510d, claimant's permanent disability benefits are governed by K.S.A. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

As indicated above, the parties stipulated at oral argument before the Board that claimant's wage loss is 100 percent and his task loss is 34 percent. Accordingly, following

¹³ *Casco* at 516-17.

the permanent partial general disability formula of K.S.A. 44-510e, the Board averages those losses and finds that claimant's work disability is 67 percent.

It should be noted that after claimant's employment with respondent ended, he did obtain other jobs. Consequently his wage loss changed. Because the wage loss portion of the work disability formula changes several times, as claimant's wage loss changed, the percentage of work disability varies. Simply stated, after every change in the percentage of disability, a new calculation is required to determine if there are additional disability weeks payable. If so, the claimant is entitled to payment of those additional disability weeks until fully paid or modified by a later change in the percentage of disability. This calculation method requires that for each change in the percentage of disability, the award is calculated as if the new percentage was the original award, thereafter the number of disability weeks is reduced by the prior permanent partial disability weeks already paid or due.

But the amount of benefit does not change whether the benefits are for work disability or functional impairment, instead when the injured worker's status changes due to changes in the work disability percentage or from work disability to functional impairment the only change under the current statute is the length of time the employee is entitled to receive benefits. As noted the claimant's work disability changes several times but due to the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the final amount due, therefore, this award simply uses the final percentage of permanent partial general disability to compute the total number of weeks of permanent partial disability compensation.

In conclusion, claimant is entitled to receive permanent partial general disability benefits for a 67 percent work disability and Amarr and its insurance carrier are responsible for the benefits claimant is entitled to receive as a result of both accidents.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated June 15, 2009, is modified to reflect claimant suffered a 67 percent work disability and the costs are assessed against respondent Amarr Garage Doors.

The claimant is entitled to 29.57 weeks of temporary total disability compensation at the rate of \$449 per week or \$13,276.93 followed by permanent partial disability compensation at the rate of \$449 per week not to exceed \$100,000 for a 67 percent work disability, which is ordered paid in one lump sum less amounts previously paid.

RONALD D. BOWER

**DOCKET NOS. 1,024,862
& 1,031,956**

IT IS SO ORDERED.

Dated this _____ day of January 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Ronald A. Prichard, Attorney for Amarr and Travelers
Matthew J. Stretz, Attorney for ConAgra
Brad E. Avery, Administrative Law Judge